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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 73-12

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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OCTOBER TERM, 1972.

No. .....

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Liberty Mutual Insurance Company (hereinafter sometimes referred to as the "Employer"), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 18, 1973.*

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A1-A2) is reported at 475 F. 2d 579. The decision of the United States District Court for the North District of Georgia, Atlanta Division (Appendix A3-A8), is reported at 5 EPD ¶ 7919 (CCH).

* On June 29, 1973, it was discovered that judgment was, in fact, entered on March 27, 1973; the confusion resulted from the facts of the notations of April 18, 1973 on the Judgment Order (see Appendix A-13) which was first received after April 18, 1973 and that the Opinion dated March 27, 1973 (Appendix A1-A2) seemed to call for the preparation of a separate order providing instructions on remand.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1), this Petition for Writ of Certiorari having been filed, in accordance with 28 United States Code, Section 2101 (c), within 90 days of the entry of the judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED.

The major issue raised by the proceeding below is whether it is proper for the District Court to enter a preliminary injunction ordering an employer to reinstate a discharged employee and to provide full back pay, without any reduction or set off for available or actual interim earnings, during the pendency of the investigation of a charge under Title VII of the Civil Rights Act of 1964 (42 U. S. C., Section 2000(e), *et seq.*, as amended) absent substantial evidence that:

a) The employee will suffer any *substantial or irreparable injury* without such preliminary relief; or

b) It is *likely* that the employer will be found to be in violation of the Civil Rights Act of 1964.

STATUTES INVOLVED.

The relevant provisions of the 1972 Amendments to Title VII of the Civil Rights Act of 1964, as amended (42 U. S. C., Section 2000(e), *et seq.*, as amended by the Equal Opportunity Act of 1972, P. L. 92-261, 86 Stat. 103 *et seq.*, March 24, 1972, hereinafter referred to as the "Act"), which require construction in this proceeding, read, in part, as follows:

Section 706(f)(1):

> "*If . . . the Commission has been unable to secure from the respondent a Conciliation Agreement acceptable to the Commission*, the Commission may bring a civil action

against any respondent . . . Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending . . . further efforts of the Commission to obtain voluntary compliance." (Emphasis supplied.)

Section 706(f)(2):

"(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action *is necessary to carry out the purposes of this Act,* the Commission, . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge . . ." (Emphasis supplied.)

Section 706(g):

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. *Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.* No order of the court shall require the . . . hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . *was suspended or discharged for any reason other than discrimination* on account of race, color, religion, sex or national origin or in violation of section 704(a)." (Emphasis supplied.)

STATEMENT OF THE CASE.

This is the first and only case reviewed by any Court of Appeals in which complete preliminary relief, ordering reinstatement and full back pay, has been granted, without any prior agency or judicial determination that the Act has been violated, in an action brought by the Equal Employment Opportunities Commission (hereinafter referred to as the "EEOC") under authority of the 1972 amendments to the Act.

Sandra Drew was discharged on April 27, 1972 by petitioner (hereinafter referred to as "Employer") for harassing management and instigating employee discontent; she had been disciplined for her caustically critical public remarks to supervisors and co-employees concerning the wage scale, a proposed cost of living increase and work assignments of the Employer in its Atlanta, Georgia office.

Unknown to the Employer, Mrs. Drew had filed a charge alleging sexual discrimination with the EEOC the day before her discharge, which she thereafter amended to include the fact of her discharge.

The EEOC filed its Complaint herein on May 12, 1972 alleging that Sandra Drew was discharged by the Employer in violation of the Act in that, allegedly, she was discharged because she filed a charge with the EEOC and because she opposed employment practices made unlawful by the Act. The Complaint prayed, *inter alia,* that the Employer be enjoined from disciplining any employee for opposing employment practices or for participating in the EEOC investigation and that Sandra Drew be reinstated to her former position of employment with full back pay.

Following a hearing upon a motion of the EEOC for a preliminary injunction, the District Court concluded that Mrs. Drew "*may* have been discharged . . . because of either the threatened filing of the EEOC charge or the actual filing of the EEOC charge . . ." (Appendix A9) in that *"there appears*

to be some possibility that she was terminated as a result of her involvement with EEOC" (Appendix A12) (emphasis supplied). Thereupon, the court ordered the Employer to immediately reinstate her and, despite the court's conclusions that Mrs. Drew made no effort to seek another job and that jobs in the Atlanta area are very plentiful (Appendix A10), further ordered the Employer to pay her full compensation for the period she had been discharged plus interest.

The Court of Appeals, in a *per curiam* opinion dated March 27, 1973, simply affirmed the District Court's judgment on the basis that "our review of the record fails to convince us that the District Court abused its discretion in issuing the order.[1] (Appendix A2.)

The result of the proceedings below was a grant of full preliminary relief on an almost automatic basis; that is, the EEOC obtained for Mrs. Drew reinstatement and full back pay plus interest, without any application of statutory deductions, in a preliminary proceeding based upon a mere possibility of a potential violation of the Act. The lack of any standards for such sweeping interim relief prior to any actual determination on the merits is the reason that certiorari is now sought.

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Conflicts with Well Established Law Governing the Grant of Preliminary Relief.

1. The Limitations Ordinarily Placed on the Issuance of Temporary Injunctions.

Under general principles of law, the fact that a complainant can ultimately obtain full compensatory relief at the conclusion of litigation, including administrative proceedings, will preclude any preliminary award.

1. The Court of Appeals also chastised the EEOC for its delay in proceeding on the charge of Mrs. Drew and remanded the matter to the District Court for the purpose of compelling the EEOC to proceed with its investigation and disposition of the charge.

The tests for the extraordinary award of preliminary relief, limiting such relief to the exceptional case, have been well stated by the D. C. Circuit in *Virginia Petroleum Jobbers Assn.* v. *Federal Power Commission*, 259 F. 2d 921 (C.A. D.C., 1958), part of which reads as follows:

"1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." In the instant case there was no such strong showing since the Court clearly stated that there was merely some possibility of a violation, *i.e.* "a likelihood . . . she may have been discharged" in violation of the Act (Appendix A9)."

Petroleum Jobbers proceeds to require:

"2) Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Since it is clear that reinstatement and back pay would be awarded to the charging party in the event that she prevailed after the matter had been fully investigated and determined, where is the irreparable harm in being unemployed by petitioner during the pendency of the proceedings? Indeed, the Trial Court concluded that the discharged employee did not seek other employment although jobs were plentiful in the area and she could have relied on her husband for support (Appendix A5, A9-10); nonetheless there was a contrary written finding of irreparable harm (Appendix A6). The Court of Appeals completely failed and neglected to review the factual basis for a finding of irreparable harm which

concededly was a necessary condition precedent to the issuance of the temporary injunction.

Neither of the decisions below apply any of the above required tests and therefore portend that even absent any evidence of irreparable harm or absent any strong showing that the discharged employee is likely to prevail, full preliminary relief will be granted the EEOC in the ordinary and usual case being processed involving alleged discrimination.

This automatic approach to the unconditional grant of a preliminary injunction, without requiring proof of a specific necessity for interim relief in a given factual situation, is wholly incompatible with the general body of law governing the issuance of temporary injunctions.

2. The Limitations to Any Grant of the Preliminary Relief of Reinstatement and Back Pay Under Specific Federal Statutes.

Labor relations law[2] and civil service law[3] are two areas of Federal regulation of the employment relationship, which are therefore somewhat analogous to the regulation under the Act. In both of these areas of Federal law, preliminary relief has been traditionally limited to the extraordinary case under conditions wholly circumscribed by judicial standards.

In the labor relations field, the law is well established that the preliminary injunctive relief of reinstatement is to be afforded by the courts only in a case involving a serious and extraordinary set of circumstances.[4] The standards enunciated

2. See Section 10(j) of the National Labor Relations Act, as amended, 29 U. S. C. Section 160(j) which allows the NLRB to petition the District Court for "appropriate temporary relief or restraining order" following the issuance of a complaint charging an unfair labor practice.

3. 5 U. S. C. (Supp. V) 3321 *et seq.* and 5 C. F. R. Sect. 315.801 *et seq.*

4. *Minnesota Mining & Mfg. Co.* v. *Meter*, 385 F. 2d 265 (C. A. 8, 1967). See also, *Selchow & Righter Co.* v. *Western Printing & Lithographing Co.*, 112 F. 2d 430 (C. A. 7, 1940); *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1929); *Alameida Bus Lines, Inc.* v. *Curran*, 209 F. 2d 680 (C. A. 1, 1954).

in the various decisions prohibit the issuance of a temporary injunction except under such exceptional circumstances where "the unfair labor practices, unless contained would have an adverse and deleterious effect on the rights of the aggrieved party which could not be remedied through the normal Board channels."[5] Thus, under the National Labor Reations Act, the run-of-the-mill discharge case would not be appropriate for District Court award of the preliminary relief of reinstatement and back pay although the discharge constituted an unfair labor practice; in any such case, the National Labor Relations Board is compelled by law to process the matter through its entire procedure of charge, investigation, complaint, hearing, decision and appeal before seeking enforcement in the United States Court of Appeals. What is the justification for providing summary relief in the ordinary discharge case alleging a violation of Title VII? The answer is that there is no justification. The same ultimate reinstatement and back pay award, assuming that a violation is established, can be accomplished after the processes of the EEOC, which have been established for this purpose, have been fully utilized, and the discriminatee will then be fully compensated by an award, including, when appropriate, reinstatement and back pay, and therefore can not be held to have been irreparably damaged by the delay of due process.

This principle that injunctive relief is the exception to the broad rule also has been applied in the area of disputed discharges of employees of the federal government.[6] This general proposition precluding the issuance of preliminary relief in the ordinary case has been challenged recently by the Court of Appeals for the District of Columbia Circuit in the case of

5. *Minnesota Mining & Mfg. Co.* v. *Meter, supra* at 7.

6. See *American Federation of Government Employees* v. *Resor*, 442 F. 2d 993 (C. A. 3, 1971); *U. S.* v. *Professional Air Traffic Controllers Organization*, 438 F. 2d 79 (C. A. 2, 1970), cert. den. 402 U. S. 915; *Ogden* v. *Department of Transportation*, 430 F. 2d 660 (C. A. 6, 1970); *Hills* v. *Eisenhart*, 256 F. 2d 609 (C. A. 9, 1958), cert. denied 358 U. S. 832.

Kunzig v. *Murray* (462 F. 2d 871, C. A. D. C. 1972). In *Kunzig*, the D. C. Circuit upheld the issuance of a preliminary injunction preventing the General Services Administration from discharging an employee until completion of the full administrative proceeding provided under the federal regulations of civil service. This Court has granted a writ of certiorari (No. 72-402, October term, 1972) to review this decision which constitutes a radical departure from the main stream of law under which the judicial grant of preliminary injunctive relief pending an administrative proceeding is ordinarily limited to the unusual case in which real irreparable harm is established by reason of a specific finding that the ultimate remedy cannot compensate for the alleged unlawful action already taken.

Thus, an issue presented in this petition is the justification for the departure from judicial standards which normally limit the Court's intervention, through its injunctive powers, into administrative proceedings; this is the same question as is presented in *Kunzig* and therefore this case is equally appropriate for review by this Court to establish appropriate judicial standards for the proper administration of the Act as recently amended.

B. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, but Which Should Be, Settled by This Court.

1. The Unsettled Question as to the Requirement of Agency Proceeding Before the EEOC May Seek Preliminary Judicial Relief.

The EEOC has judicially sought and obtained reinstatement and full back pay plus interest for a charging party under authority of Section 706(f)(2) of the Act at a time when it had not completed its investigation of the charge, had not concluded that the charge had probable merit and had made no effort at conciliation with respondent, the petitioner herein. The prerequisite for judicial intervention under this section has been

declared by Congress to be that such preliminary action "*is necessary to carry out the purposes of this Act.*" How can the EEOC ever allege, let alone prove, that there is necessity for preliminary judicial intervention to carry out the purposes of this Act before the EEOC has investigated the charge and found that there is reasonable cause to believe a violation has occurred. In the instant case, the District Court made no finding that the injunction was necessary to carry out the purposes of the Act; indeed there was no evidence offered on this point. The overhasty suit by the EEOC in the instant case, approved by the Court below, therefore dramatically raises the unsettled question as to the extent of agency action required as a condition precedent to a petition by the EEOC for preliminary judicial relief. It is submitted that substantial prior agency action should be required before it can be concluded that the injunction is required to carry out the purposes of the Act; the precipitous summary action by the Court at the request of the EEOC, as presented herein, rather than carrying out the purposes of the Act instead does violence to the general statutory scheme for the resolution of charges of alleged discrimination for which an orderly and deliberate procedure has been meticulously set forth under the Act.[7]

This general statutory scheme, emphasizing informal settlement of an alleged violation whenever possible, has not been superseded by the 1972 amendments to the Act. Rather, a final step was added to the existing process by providing:

> "If within 30 days after a Charge is filed with the Commission . . . the Commission has been unable to secure from

7. The general scheme of the Act is to empower the EEOC to seek out and thereafter eliminate unlawful employment practices primarily utilizing the informal methods of conference, conciliation and persuasion (Section 706(f)(1). The process to be utilized by the EEOC in reaching the conciliation stage includes the precedent deliberate steps of 1) a charge being filed; 2) the respondent being notified thereof; 3) an investigation by the EEOC; and 4) a conclusion being reached by the EEOC that there is reasonable cause to believe a violation of the Act has occurred.

> the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . ." (Section 706(f)(1)).

Clearly, in enacting the 1972 amendments, Congress did not intend to discard the orderly steps leading to conciliation but simply to strengthen the persuasive powers of the EEOC in seeking conciliation by arming it with the additional power to seek enforcement of the Act in court *failing a satisfactory conciliation.*

Yet, in haste to exercise its newly granted powers to litigate cases involving an individual charge,[8] the EEOC has brought actions in the District Court prior to completion of the deliberate steps required under the Act by precipitously instituting actions for preliminary relief instead of awaiting the completion of an investigation which would, at least, result in a determination of the necessity or propriety of seeking interim relief to carry out the purposes of the Act.[9]

The EEOC has not been so successful in the only other relevant case decided under this new provision of the Act. In the case of ***EEOC*** v. ***Container Corporation of America,*** 5 EPD 8014 (CCH) (U. S. D. C., Middle District of Florida, 1972), the District Court dismissed an action on the basis that some

8. The Commission through the Attorney General's office has had continuously since the passing of the original Act in 1964 the authority to litigate matters in which a respondent has been deemed to be guilty of a pattern of violations.

9. The further question raised by the proceeding below is whether the grant of judicial jurisdiction to provide preliminary relief under Section 706(f)(2) of the Act is supplemental to the general litigation authority of Section 706(f)(1) and subject to all or some of the conditions precedent to bringing suit therein set forth. That is, since the EEOC has failed to complete the process referred to in note 7, *supra,* thereby preventing the District Court from exercising jurisdiction to resolve the entire controversy under Section 706(f)(1), can the EEOC nonetheless apply to the Court for temporary injunction under Section 706(f)(2)? The decision of the Court below simply answered in the affirmative on this matter of first impression without considering any implicit conditions precedent to the grant of preliminary relief.

conciliation effort, something more than an investigation, is a statutory condition precedent to bringing suit. The Court held:

> "If, as the defendants contend, there are statutory preconditions to bringing suit, to foreclose judicial inquiry into the satisfaction of the conditions would eliminate them from the Act. The Court concludes that the question of the EEOC's satisfaction of the statutory conditions precedent to suit is a proper and indeed a necessary subject of judicial inquiry."

In the *Container Corporation* case, the Court refused to enter any preliminary relief.

2. The Unsettled Question as to Judicial Standards Limiting the Grant of Total Preliminary Relief in a Suit by the EEOC.

Assuming arguendo that the Courts below were correct that Section 706(f)(2) grants the District Court preliminary injunction jurisdiction prior to the completion of any meaningful investigation or any conciliation efforts by the EEOC, under what conditions should preliminary injunction relief be granted upon the request of the EEOC? The newly enacted statute (Section 706(f)(2) is enigmatic as to this point in that its language simply grants the EEOC discretionary authority to bring the action when "necessary to carry out the purposes of this Act," and, together with Section 706(f)(3), grants the District Court jurisdiction to hear and decide the issue.

The Court of Appeals decision below sheds no light on the obscure question of when and under what circumstances and to what extent temporary relief would be necessary to carry out the purposes of the Act. From the decision, it would seem that the answer is that an injunction will be granted in every case in which the EEOC seeks such relief; the authority of the decision below portends the issuance of a preliminary injunction in every case of alleged discriminatory discharge upon any minimal showing of a mere possibility that the charge has merit. This standard is an inadequate barrier to automatic temporary relief

in the ordinary case. There is a need for definition of those specific circumstances which would establish a legitimate need for preliminary relief to protect the ultimate efficacy of the Act and to prevent irreparable harm. It is submitted that unless the requirement is imposed that there must be a substantial evidentiary showing which conclusively demonstrates an extraordinary need, automatic, full, preliminary injunctive relief will be granted in every case. This would be a result obviously contrary to the intent of Congress in enacting the amendments to the Act.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 72-2834

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

(March 27, 1973)

Before WISDOM, GEWIN and COLEMAN,
Circuit Judges.

PER CURIAM: This appeal arises out of an action brought by the Equal Employment Opportunity Commission under Title VII, Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq., as amended by the Equal Employment Opportunity Act of 1972 P. L. 92-261, 86 Stat. 103 (March 24, 1972), seeking reinstatement and back pay for the allegedly aggrieved party, Sandra Drew, pending final disposition of her charge before the

Commission. The Appellant, Liberty Mutual Insurance Company (Liberty), complains of an order issued by the District Court requiring it to reinstate Mrs. Drew to her former position and directing that she be given back pay with interest from the date of her discharge.

We are unable to agree with the contention of Liberty that the record fails to support the action taken by the District Court. Our review of the record fails to convince us that the District Court abused its discretion in issuing the order. However, we take note of the fact that the order of the District Court has provided Mrs. Drew with full pay for a period of almost one full year. In addition, she was allowed interest on the back pay awarded to her during the period of her discharge before reinstatement.

Pursuant to inquiry by this Court on oral argument, counsel for both parties informed the Court that nothing substantial has been accomplished by the Commission with respect to Mrs. Drew's complaint since the District Court entered its order. This case should receive immediate attention and the controversy should be brought to a proper conclusion. We do not approve the delay by the Commission which is evident in this case, especially in circumstances in which the relationship between employer and employee is seriously affected by the terms of an injunctive order.

We remand the case to the District Court with Directions to institute appropriate procedures to require the Commission to proceed with the investigation and possible disposition of the complaint involved in accordance with the duties imposed upon it by the applicable statutes and that this litigation be brought to a conclusion without further undue delay.

AFFIRMED AND REMANDED.

UNITED STATES DISTRICT COURT

* * (Caption—16590) * *

ORDER.

This action came on for hearing on plaintiff's motion for a preliminary injunction on May 30 and 31, 1972. At the close of the hearing the court orally entered a preliminary injunction. This order making findings of fact and conclusions of law is issued in connection therewith.

FINDINGS OF FACT.

1. This action was brought by the Equal Employment Opportunity Commission pursuant to § 706(f)(2), Title VII, Civil Rights Act of 1964, 42 U. S. C. § 2000e-5, as amended by Public Law 92-261, 86 Stat. 103 (March 24, 1972).

2. Plaintiff is an agency of the United States Government, charged with responsibility, *inter alia*, for receiving and investigating charges of discrimination in employment filed by or on behalf of aggrieved persons; for attempting to eliminate any such discrimination by informal methods of persuasion, and, in appropriate cases, for bringing suit to end such discriminatory employment practices.

3. The defendant is a corporation doing business in the State of Georgia and in the City of Atlanta.

4. Sandra Jane Drew was hired on September 13, 1971, as a Claims Representative in the Claims Department of the defendant's Atlanta City Office. The uniform appraisal of Drew's job performance by management, her supervisors and co-workers is that she was an above average employee.

5. The Claims Department of the Atlanta City Office consists of technical and clerical employees. The technical employees are divided into two groups, Claims Representatives and

Claims Adjusters. The Claims Representatives are all female; indeed, all of the 75 Claims Representatives in the nine state Southern Division are female. The Claims Adjusters classification is a predominently male classification; until 1971 no female had ever been hired or promoted into the Claims Adjuster classification. The starting salary for Claims Representatives is $5300 annually while Adjusters begin at $7500 a year.

6. On August 26, 1970, a "technical claims person" was appointed to be in charge of handling all automobile total loss claims, and a male Adjuster was selected to fill the position. Prior thereto the total loss responsibility had been distributed among the Claims Representatives. The position was held continuously by a male Adjuster until February 7, 1972, when Sandra Drew assumed the position.

7. On February 1, 1972, Drew was called into the office of Mr. Wilsie Hutts, Manager of the Claims Department and told that she had been selected to fill the position at the total loss desk. Drew was advised at this time by Mr. Hutts that she would not receive the same salary, fringe benefits nor all the responsibilities that had been associated with the job when held by an Adjuster.

8. On April 6, 1972, Drew filed a charge of discrimination with the Equal Employment Opportunity Commission, charging defendant with sex discrimination in employment.

9. On the following day, April 7, 1972, Mr. Joseph S. Raine, Jr., Assistant Claims Manager, took Drew to see Mr. Orland Krug, Division Claims Manager, who told her that he had learned that she disagreed with company policy. Krug would not accept Drew's offer to discuss their differences. He told her that she had the option of either terminating her employment voluntarily or of being discharged. She chose the latter and was immediately discharged. The reason given by Krug at the May 30-31, 1972 hearing in this case was that she had disagreed with company policy by insisting on being paid the same salary as her predecessors and because of her

"poor attitude." Drew was given no notices, warnings or indication prior to her meeting with Krug that her conduct was unacceptable.

10. Drew was the first employee ever discharged in the Southern Division for opposing company policy. The only other instance in which an employee was discharged without notice occurred some 10 years earlier when an employee was found to have misappropriated company funds.

11. Drew is the sole breadwinner for her family, as her husband is a full-time student.

12. Cheryl Goldberg was hired in August, 1971, as a Claims Representative in the Claims Department of the defendant's Atlanta City Office.

13. Prior to May 5, 1972, agents of defendant reviewed the work performance of Cheryl Goldberg and found it to be deficient.

14. On May 5, 1972, Cheryl Goldberg was discharged by defendant. On May 22, 1972, she commenced work at another job.

15. The defendant has no standards, written or otherwise, with respect to its discharge and disciplinary policies. Employees are given no indication as to which offenses can result in immediate discharge, nor are they told how many warnings or notices may be given in different situations.

16. On May 16, 1972, a meeting was held by defendant at which Raine advised the Claims Representatives that they need not fear retaliation for cooperating with the EEOC. An EEOC investigator, present at the meeting, told Mr. Raine that he was satisfied with the assurances given.

Conclusions of Law.

1. The court has jurisdiction of this action pursuant to § 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972.

2. Defendant Liberty Mutual Insurance Company is an employer engaged in an industry affecting commerce within the meaning of § 701(b) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e(b), as amended.

3. There is not a likelihood that Cheryl Goldberg will prevail on the merits of her charge that she was terminated from employment by defendant because she had opposed the discharge of Sandra Drew or because she had assisted the EEOC in its investigation of Sandra Drew's charge of sex discrimination.

4. There is a likelihood that Sandra Drew will prevail in the merits of her charge that she was terminated from her employment by defendant because of opposition to unlawful employment practices and/or because she filed a charge with the EEOC in which she alleged that defendant practiced sex discrimination in its employment practice.

5. Until reinstated to the job which she held prior to termination, Sandra Drew was suffering, and would have continued to suffer, irreparable harm.

6. The reinstatement of Sandra Drew to her former position pending the EEOC's disposition of her charge of discrimination will not substantially harm defendant.

7. The action of the defendant in making known to its employees that they may cooperate with the EEOC in its investigation of the charges filed by Sandra Drew and Cheryl Goldberg and in the investigation of any other charge without fear of loss of employment or benefits obviates the need for any injunction regarding this aspect of the action.

Accordingly, defendant is hereby Ordered to reinstate Sandra Drew to her former position at the Total Loss Desk, with all the responsibilities and duties which were formerly assigned to that position. It is further Ordered that defendant convey to Sandra Drew the pay which she would otherwise have received from the date of discharge, April 7, 1972, until her reinstate-

ment on June 1, 1972. All back pay shall be at six per cent interest.

In accordance with 42 U. S. C. § 200e-5(k), the costs, not including attorney's fees, of the Equal Employment Opportunity Commission, the prevailing party, shall be taxed against defendant.

On May 23, 1972, the court entered an order regarding discovery. Defendant was ordered to produce within three days documents and information which were readily accessible to its Atlanta office. Information relating to non-current employees of defendant and which was not readily accessible was not required to be produced until June 9, 1972. On June 9, 1972, on motion of the defendant, the court entered an order staying the portions of the May 23 order which had not already been complied with, pending responsive brief from the plaintiff. The EEOC urges the court to continue in effect the entirety of the order of May 23.

The information now sought by the EEOC relates to former employees of the defendant, dating back to July 2, 1965. The EEOC seeks such personnel records in order to make an analysis of the employer's practices, comparing treatment of Drew and Goldberg with treatment of other employees, especially regarding termination. Further, the EEOC seeks such records for the purpose of proving the underlying charge of sex discrimination.

In the present action brought under § 706(f)(2) of Title VII, as amended, the preliminary relief which has been granted by the court is, in effect, the final relief the court can order. While the court will of course retain jurisdiction of the matter in order to insure compliance with its injunction, the court cannot, under the statutory scheme set up by Title VII, proceed to entertain a request for permanent relief or for a ruling on the merits of the charge of discriminatory employment practices. The effect of the court's action in this case is simply to avoid

irreparable harm to complainant Drew pending final disposition of her charge by the EEOC.

Defendant thus argues that any futher discovery is not warranted, and is not relevant to the instant action, as the EEOC has already obtained the preliminary relief sought. The court is in agreement. While the EEOC may very well be entitled to all the information sought, it should proceed administratively according to § 710 of Title VII, as amended (42 U. S. C. § 2000e-9). Although, as the brief from the EEOC points out, such a ruling may require the EEOC to return to court for an order enforcing discovery, it is to be hoped that the dispute regarding discovery can be resolved through the administrative process without the need for any court action on the matter.

The court holds that the further discovery relating to non-current employees of defendant is irrelevant to the present action. Accordingly, the defendant's motion to reconsider is hereby Granted and defendant is relieved from the requirement of compliance with paragraphs one and two of the court's order of May 23, 1972, insofar as those paragraphs require discovery regarding non-current employees.

In sum, the court has today Granted plaintiff's motion for a preliminary injunction; Ordered defendant to reinstate Sandra Drew to her former position, with back pay; taxed costs of the plaintiff, excluding attorney's fees, against the defendant; Granted, defendant's motion for reconsideration of the court's order of May 23, 1972; and relieved defendant from the requirement of compliance with portions of the order of May 23.

It Is So Ordered.

This, the 12th day of July, 1972.

RICHARD C. FREEMAN,
Richard C. Freeman,
United States District Judge.

EXCERPT OF PROCEEDINGS BEFORE THE U. S. DISTRICT COURT

The Court: I believe your testimony previously was that you received a telephone call prior to the time that Mrs. Drew was discharged from some company representative in Boston asking if you knew if a charge had been filed by Mrs. Drew, is that correct?

The Witness: That's correct.

The Court: Do you have any questions?

Mr. Terry: No, Your Honor.

Mr. Sinclair: No questions.

Mr. Grove: No, sir.

The Court: You may go down.

Mr. Grove: The defendant has nothing further and again we ask the motion to dismiss, the same reason as previously.

The Court: All right, gentlemen. With respect to Miss Goldberg, I believe the Commission has failed to present sufficient evidence to indicate to me that she was terminated or may have been terminated because of alleged cooperation with the EEOC and I will let the defendant submit to me by Wednesday, that is a week [374] from today, a proposed order including special findings with respect to Miss Goldberg.

With respect to Mrs. Drew, I believe that the Commission has put up sufficient evidence to indicate that there is a likelihood on the merits of this case she would—we are not dealing with the merits of this case—that she was charged—she may have been discharged—because of either the threatened filing of the EEOC charge or the actual filing of the EEOC charge and, in that regard, I will order the defendant to reinstate Mrs. Drew to her position as claims representative on the Total Loss desk, whatever the official title is, I can't recall, and I will order the defendant to give her her back pay for this period in question.

Mr. Grove: May I ask one question?

The Court: Yes, sir.

Mr. Grove: I think you already said it, but what about the fact that Sandra Drew made no effort whatsoever to find work.

The Court: That troubles me a little.

Mr. Grove: Should we be penalized because of that?

The Court: That troubles me a little bit, but she has given what I consider—let me say this as long as I am saying some things: I worked my way through law school. I was married when I was a [375] freshman in law school and I worked my way the rest of the year through law school. My wife never worked. It seems today wives work and support their student husbands. This seems to be what is going on all over the country in every way. We had three or four who testified today that they are doing this. I am not impressed by Mrs. Drew's argument in that regard or her statement in that regard, nor am I impressed with the allegations in the petition with her husband's inability to work and I want to state that for the record.

In this particular case, I think I will order her back pay given to her.

Mr. Grove: It seems obvious if you believe what Cheryl Goldberg said that jobs are plentiful in the Atlanta area and she would have no difficulty.

The Court: Jobs are plentiful. I don't think there is any question about it. She felt she needed to concentrate on this. Why? That is a decision for her to make, so I will order you to give her her back pay for this period in question.

Now, with respect to posting notice and advising all officers, agents, servants, employees, attorneys to communicate with the employees of the defendant, I have no intention of ordering that. I feel that Liberty Mutual in this case has indicated its willingness to [376] make its employees knowledgeable and

aware of the fact that there will be no reprisals for their "co-operation" with the EEOC and, consequently, I will not—I have forgotten what you asked for, Mr. Terry. You asked me to enjoin the defendants from threatening, discriminating or retaliating against, and so forth. I feel that the Court retains jurisdiction over that matter and if it does occur, you can come to this court.

I will likewise give you until Wednesday of next week to file proposed order with special findings, conclusions of law and findings of fact. You have until Monday afternoon with respect to Mr. Sinclair's position. I don't know what my statement from the bench does with respect to his right to intervene. I think probably we could treat his complaint as a form of intervention. I don't know. The basic question is: we are dealing with attorney's fees and I just don't believe—I don't know what the law is with respect to attorney's fees for an intervention in a case like this. I am not disposed—I will give you until Monday, as I told you, Mr. Sinclair, you, Mr. Prager, Mr. Terry, Mr. Grove and others, to file briefs with respect to Mr. Sinclair's position representing Mrs. Drew in the private litigation. Any question?

Mr. Sinclair: I have one, Your Honor, in regards [377] to the intervention then as far as attorney's fees, you want that briefed as well?

The Court: Well, I suppose. As I say, I just don't know. You might look at it.

Mr. Grove: You are not going to be afforded attorney's fees, if at all, at this time. Do we really have to brief that at this time?

The Court: No, no. I am just saying that that is a question in the case ultimately if he stays in. It is a Title 7 proposition but he can ask for attorney's fees and the Court can award them.

Mr. Grove: I understand.

The Court: What I am saying is: I don't know if we throw that out and allow him to intervene, I just don't know what the law is with respect to attorney's fees in this kind of intervention. I don't know. You might look into it if you want to. We don't have to deal with it.

Mr. Grove: I don't want to deal with it in the brief we have to file Monday.

The Court: I don't intend to deal with even from the standpoint of hearing any evidence as to what he is entitled to or anything else. I am saying it is something that we probably will have to consider sooner or later. We might as well look at it now. Is there [378] anything else?

Mr. Terry: Your Honor, I am always embarrassed to belabor the Court for a few moments. I would like to make a few closing arguments and maybe raise a couple of observations. I think it would be appropriate and the Government strongly urges that Mrs. Drew's file be purged that she has a poor attitude toward her work or she was in anyway a bad employee with respect to these things.

The Court: The only thing I have done here today is make a finding that based on the evidence that the Commission put up, that there appears to be some possibility that she was terminated as a result of her involvement with EEOC, and that if she is not restored and put back to work, she will continue to suffer what I considered to be what she has alleged irreparable harm. I haven't decided the whole case yet. I don't have to deal with that. I don't think it is appropriate for me to enter any order with respect to purging her record or anything. I would deny your request.

* * * * *

[381] Mr. Terry: One question, I promise it will be the last. Is it your order that Mrs. Drew go back to work tomorrow morning at Liberty Mutual?

* * * * *

POOR COPY

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

FILED IN CLERK'S OFFICE
APR 19 1973
Clerk, U. S. Court of Appeals
By _____ Deputy Clerk

RECEIVED
APR 19 1973
CLERK'S OFFICE

No. 72-2834

D. C. Docket No. CA-16590

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

versus

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Appellant,

Appeal from the United States District Court for the Northern District of Georgia.

Before WISDOM, GEWIN and COLEMAN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 27, 1973

Issued as Mandate: APR 18 1973

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By _____ Deputy
New Orleans, Louisiana
APR 18 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-12

LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

The judgment in this case was entered on March 27, 1973 (App., *infra*).[1] No extension of time for filing the petition for a writ of certiorari was obtained, and the petition was filed on June 26, 1973, 91 days after the entry of judgment. The petition therefore was not timely filed within the 90-day jurisdictional time provided in 28 U.S.C. 2101(c).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

[1] The clerk of the court of appeals has informed us that the judgment was entered on that date, and that it was subsequently stamped by the district court clerk's office "Filed in [District Court] Clerk's Office April 19, 1973."

[2] The 90 day period runs from the entry of judgment, rather than the issuance of the mandate. *Boylan* v. *United States*, 257 U.S. 614.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1972

No. 72-2834

D. C. Docket No. CA-16590

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

LIBERTY MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT

Appeal From the United States District Court for the Northern District of Georgia.

Before WISDOM, GEWIN and COLEMAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 27, 1973

A true copy:

Test: EDWARD W. WADSWORTH

Clerk of the United States Court of Appeals for the Fifth Circuit.

BY MARYETTE K. FARLEY
Deputy

New Orleans, Louisiana

Issued as Mandate: April 18, 1973

DOJ-1973-08